A

Samuel Naik Siang Ting v Public Bank Bhd

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-39–07 OF 2013(A)
AHMAD MAAROP, ZAINUN ALI, RAMLY ALI, AZAHAR MOHAMED AND ZAHARAH IBRAHIM FCJJ
30 SEPTEMBER 2015

C

Banking — Securities for advances — Mortgage — Equitable mortgage — Land assigned to financier as security for loan — Whether lender becomes equitable mortgagee — Whether lender may deal with property absolutely and beneficially upon default of loan — Whether equitable interest prohibited by
D *National Land Code — Whether court ought to enforce equitable mortgage*

Civil Procedure — Pleadings — Parties bound by — Whether facts and issues not pleaded may be adduced — Whether vital issue not pleaded can be raised on
E *appeal*

Contract — Breach — Breach of undertaking — Whether proven — Breach of undertaking by developer to deliver subdivided individual titles to lender

F

Equity — Equitable mortgage — Land assigned to financier as security for loan — Whether lender becomes an equitable mortgagee — Whether equitable interest prohibited by National Land Code — Whether court ought to enforce
G *equitable mortgage — Whether title of bona fide registered proprietor without notice can be defeated by non-registered earlier equitable interest of absolute assignee*

Land Law — Assignment — Land assigned to financier — Equitable mortgage
H *— Whether lender becomes an equitable mortgagee — Whether lender may deal with property absolutely and beneficially upon default of loan — Whether equitable interest prohibited by National Land Code — Whether court ought to enforce equitable mortgage*

I

Land Law — Sale of land — Bare trust — Vendor reselling property already sold to earlier purchasers — Whether vendor merely a bare trustee — Whether subsequent conveyance of property to new purchasers void ab initio — Whether memorandum of transfer to new purchasers a void instrument — Whether failure

of earlier purchaser to lodge private caveat defeated his equitable interests

Land Law — Indefeasibility of title and interests — Transfer of land — Whether title of bona fide registered proprietor without notice can be defeated by non-registered earlier equitable interest of absolute assignee — Vendor reselling property already sold to earlier purchasers — Whether subsequent conveyance of property to new purchasers void ab initio — Whether memorandum of transfer to new purchasers a void instrument — Whether failure of earlier purchaser to lodge private caveat defeated his equitable interests — Whether new purchaser's title defeasible — Whether proviso to s 340(3) of the National Land Code applicable

Land Law — Interest in property — Equitable mortgage — Land assigned to financier as security for loan — Whether lender becomes an equitable mortgagee — Whether lender may deal with property absolutely and beneficially upon default of loan — Whether equitable interest prohibited by National Land Code — Whether court ought to enforce equitable mortgage

Land Law — Mortgage — Equitable mortgage — Land assigned to financier as security for loan — Whether lender becomes an equitable mortgagee — Whether lender may deal with property absolutely and beneficially upon default of loan — Whether equitable interest prohibited by National Land Code — Whether court ought to enforce equitable mortgage

Land Law — Sale of land — Validity of agreement — Vendor reselling property already sold to earlier purchasers — Whether vendor merely a bare trustee — Whether subsequent conveyance of property to new purchasers void ab initio

Majlis Perbandaran Manjung ('MPM') was the registered proprietor of a piece of land ('the land') before it was subdivided. The land was subsequently subdivided into various lots ('the lots'). MPM, vide a joint venture agreement appointed Bersatu Maju Properties Sdn Bhd ('BMP') as the developer to develop the land into a mixed development project. MPM and BMP executed various sales and purchase agreements ('SPAs') in relation to the lots in favour of the certain purchasers ('the earlier purchasers'). The respondent had granted loans to the earlier purchasers to finance the purchase of the lots. Since individual titles were yet to be issued, the loans were secured upon the relevant loan agreements, deeds of assignment in favour of the respondent and letter of undertaking from MPM and BMP to deliver to the respondent the individual documents of title upon issuance thereof. The loans were duly disbursed in full to BMP. However, upon issuance of the individual subdivided titles subsequently, MPM and BMP failed to notify and deliver the individual titles to the respondent. Not only that, MPM and BMP had then sold the lots to the

first to fifth defendants (including the appellant herein) ('the new purchasers') and had executed new SPAs with them. The subdivided titles to the lots were then registered in the name of the new purchasers. Upon discovery, the respondent lodged private caveats on the lots. In the meantime, the earlier purchasers defaulted on their loan repayments and the respondent obtained judgment against them. The respondent then commenced the present action against the new purchasers where the High Court made the following declarations in favour of the respondent pursuant to an application under O14A of the Rules of the High Court 1980: (a) that the earlier purchasers were the rightful owners of the lots; (b) that the respondent was the legal assignee of the titles and interests to the said property by virtue of the various deeds of assignment; (c) that the SPAs entered into by the new purchasers were void and set aside; (d) that the transfers of the lots to the new purchasers were void ab initio; and (e) that the new purchasers' names in the respective documents of title be cancelled and the earlier purchasers be registered as the rightful owners of the lots. The Court of Appeal affirmed the decision of the High Court. The appellant was granted leave to appeal to the Federal Court on the following question: 'whether the title of bona fide registered owner without notice under the National Land Code ('the NLC') can be defeated by a non-registered interest of an assignee/lender under an earlier sale and purchase agreement in respect of the same piece of land with other purchasers other than the first applicant'. It had been pleaded and all along an agreed fact that at the time when MPM entered into the SPAs, MPM was the registered proprietor of the land. However, during submission-in-reply before the Federal Court, the appellant's counsel claimed that there was an endorsement on the title to show that MPM was not the registered proprietor and thus had no right to deal with it, as the land had earlier been surrendered and vested in the state authority.

Held, dismissing the appeal with costs:

(1) Parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded. Where a vital issue is not raised in the pleadings it cannot be allowed to be argued and to succeed on appeal (see para 29); *State Government of Perak v Muniandy* [1986] 1 MLJ 490; *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313; *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; and *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 referred.

(2) The last minute issue raised, that MPM was not the registered proprietor of the land, must be disregarded and not to be considered at all in determining the appeal. The issue raised, if accepted, would completely change the character of the appellant's defence to the respondent's claim and would be highly prejudicial to the respondent's case (see paras 32–33); *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 referred.

(3) The deeds of assignment executed in favour of the respondent were expressly for the purpose of securing the loans given to the earlier purchasers to purchase the lots. The deeds of assignment were equitable mortgages (where the respondent was an equitable mortgagee) of the earlier purchasers' rights, titles and interests under the SPAs. As the loan agreement with the appellant was in law an equitable mortgage, it followed that the respondent became an equitable mortgagee (see paras 39–40 & 43); *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513 referred.

(4) In view of the loan agreements being defaulted, the respondent was entitled to invoke cl 3(a) of the deeds of assignment to deal with all the rights and interest in relation to the said property absolutely and beneficially (see para 44).

(5) The terms of the letters of undertaking were clear and unambiguous. Both MPM and BMP were legally obliged to honour their undertakings. In failing to notify the respondent, and to deliver to the respondent the documents of title with the registrable transfer in favour of the respondent, MPM had breached the undertakings (see para 45).

(6) MPM, after executing the SPAs with the earlier purchasers and having received the full purchase price, was a bare trustee. MPM was therefore not permitted in law to sell or transfer the land to the new purchasers. The subsequent conveyances of the lots by MPM to the new purchasers were thus void ab initio, as MPM did not have any legal or requisite capacity to enter into such agreements (see paras 53–54).

(7) There is nothing in the NLC which expressly or by implication excludes or prohibits any equitable interest in alienated land. The court ought to give effect to ordinary commercial transactions and not to invalidate any equitable mortgage created by contracts outside any statutory provisions for registration of title under the NLC (see para 65).

(8) Since the subsequent SPAs with the new purchasers were void ab initio and of no effect, it followed that their related transfer forms ('Form 14A') were also void and ineffective to create a registrable transfer. The said Form 14A was thus a void instrument (see para 70).

(9) The failure on part of the respondent to lodge a caveat timeously, did not in any way negate or defeat its equitable rights, title and interests in respect of the lots (see paras 73–77); *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169; *Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330; and *Chua Hee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480 referred; *Jasalam (M) Sdn Bhd v Wong Koon Yee* [2000] 3 MLJ 115 distinguished.

(10) The relevant Form 14A in respect of the transfer of the title to the appellant was a void instrument and therefore the appellant's title and interest in the lot was indisputably defeasible. The appellant was an immediate purchaser of the lot in question from its registered proprietor, MPM. That being the case the appellant clearly could not enjoy the benefit of the proviso to s 340(3) of the NLC. Once the court was satisfied that the transfer of the title to the appellant arose from a void instrument, it automatically followed that they were liable to be set aside (see paras 82–85); *Tan Ying Hong v Tan Sian Son & Ors* [2010] 2 MLJ 1 and *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768 referred.

(11) The question posed was answered in the affirmative. The title of a registered proprietor who is a bona fide immediate purchaser without notice under the NLC can be defeated by the non-registered valid equitable interest of an absolute assignee under an earlier SPA in respect of the same piece of land (see para 86).

[Bahasa Malaysia summary

Majlis Perbandaran Manjung ('MPM') ialah pemilik berdaftar sebidang tanah ('tanah tersebut') sebelum ia dibahagikan. Tanah tersebut kemudian telah dibahagikan kepada pelbagai lot ('lot-lot tersebut'). MPM, melalui perjanjian usaha sama telah melantik Bersatu Maju Properties Sdn Bhd ('BMP') sebagai pemaju untuk memajukan tanah tersebut menjadi projek pembangunan campuran. MPM dan BMP telah melaksanakan pelbagai perjanjian jual beli ('PJB') berkaitan lot tersebut yang berpihak kepada pembeli-pembeli tertentu ('pembeli-pembeli terdahulu'). Responden telah memberikan pinjaman kepada pembeli-pembeli terdahulu untuk membiayai belian lot-lot tersebut. Oleh kerana hak milik individu masih belum dikeluarkan, pinjaman-pinjaman itu telah diperoleh atas perjanjian-perjanjian pinjaman, surat ikatan penyerahan hak yang berpihak kepada responden dan surat aku janji daripada MPM dan BMP untuk menyerahkan kepada responden surat ikatan hak milik individu selepas yang berikut dikeluarkan. Pinjaman-pinjaman itu telah pun dibayar penuh kepada BMP. Walau bagaimanapun, selepas keluaran hak milik individu yang dibahagikan berikutnya, MPM dan BMP telah gagal memberitahu dan menyerah hak milik individu tersebut kepada responden. Bukan hanya itu, MPM dan BMP kemudian telah menjual lot-lot tersebut kepada defendan-defendan pertama hingga kelima (termasuk perayu) ('pembeli-pembeli baru') dan telah menyempurnakan PJB baru dengan mereka. Hak milik-hak milik yang dibahagikan kepada lot-lot tersebut kemudian telah didaftarkan atas nama pembeli-pembeli baru. Selepas disedari, responden telah memasukkan kaveat persendirian keatas lot-lot tersebut. Pada masa sama, pembeli-pembeli terdahulu telah gagal dalam pembayaran balik pinjaman mereka dan responden telah memperoleh penghakiman terhadap mereka. Responden kemudian telah memulakan tindakan ini terhadap

pembeli-pembeli baru di mana Mahkamah Tinggi telah membuat deklarasi-deklarasi berikut berpihak kepada responden berikutan permohonan di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980: (a) bahawa pembeli-pembeli terdahulu ialah pemilik-pemilik sah lot-lot tersebut; (b) bahawa responden ialah pemegang serah hak kepada hak milik dan kepentingan hartanah tersebut menurut pelbagai surat ikatan penyerahan hak; (c) bahawa PJB yang dimasuki oleh pembeli-pembeli baru adalah terbatal dan diketepikan; (d) bahawa pindah milik lot-lot tersebut kepada pembeli-pembeli baru adalah tidak sah *ab initio*; dan (e) bahawa nama-nama pembeli-pembeli baru dalam surat ikatan hak milik dipotong dan pembeli-pembeli terdahulu didaftarkan sebagai pemilik sah lot-lot tersebut. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi. Perayu telah diberikan kebenaran untuk merayu kepada Mahkamah Persekutuan berdasarkan persoalan berikut: 'whether the title of bona fide registered owner without notice under the National Land Code ('NLC') can be defeated by a non-registered interest of an assignee/lender under an earlier sale and purchase agreement in respect of the same piece of land with other purchasers other than the first applicant'. Ia telah diplikan dan selama ini fakta yang dipersetujui bahawa pada masa apabila MPM memasuki PJB tersebut, MPN ialah pemilik berdaftar tanah tersebut. Walau bagaimanapun, sepanjang penghujahan menjawab di hadapan Mahkamah Persekutuan, peguam perayu mendakwa bahawa terdapat pengindorsan atas hak milik itu untuk menunjukkan bahawa MPM bukan pemilik berdaftar dan oleh itu tidak mempunyai hak untuk berurusan dengannya, kerana tanah tersebut telah diserahkan dan terletak dalam pihak berkuasa negeri.

Diputuskan, menolak rayuan dengan kos:

(1) Pihak-pihak terikat oleh pliding mereka dan tidak dibenarkan mengemukakan fakta dan isu yang tidak dipli oleh mereka. Di mana satu isu penting tidak ditimbulkan dalam pliding ia tidak boleh dibenarkan untuk berhujah dan untuk berjaya atas rayuan (lihat perenggan 29); *State Government of Perak v Muniandy* [1986] 1 MLJ 490; *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313; *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; dan *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157dirujuk.

(2) Isu saat terakhir yang ditimbulkan, bahawa MPM bukan pemilik berdaftar tanah tersebut, patut tidak dihiraukan dan tidak perlu dipertimbangkan langsung dalam menentukan rayuan. Isu yang ditimbulkan, jika diterima, akan menukar terus ciri-ciri pembelaan perayu terhadap tuntutan responden dan amat prejudis kepada kes responden (lihat perenggan 32–33); *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 dirujuk.

(3) Surat ikatan penyerahan hak yang dilaksanakan berpihak kepada

responden dengan jelas bagi tujuan memperoleh pinjaman-pinjaman yang diberikan kepada pembeli-pembeli terdahulu untuk membeli lot-lot tersebut. Surat ikatan penyerahan hak merupakan gadai janji yang saksama (di mana responden ialah pemegang gadai janji yang saksama) kepada hak, hak milik dan kepentingan pembeli-pembeli terdahulu di bawah PJB tersebut. Oleh kerana perjanjian pinjaman dengan perayu daripada segi undang-undang merupakan gadai janji yang saksama, ia diikuti bahawa responden telah menjadi pemegang gadai janji yang saksama (lihat perenggan 39–40 & 43); *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513 dirujuk.

(4) Berdasarkan perjanjian-perjanjian pinjaman telah dilanggari, responden berhak menggunakan fasal 3(1) surat ikatan penyerahan hak untuk mengendalikan semua hak dan kepentingan berkaitan hartanah tersebut secara mutlak dan secara benefisiari (lihat perenggan 44).

(5) Terma surat aku janji adalah jelas dan taksah. Kedua-dua MPM dan BMP bertanggungjawab sah untuk memenuhi aku janji mereka. Gagal untuk memaklumkan responden, dan menyerahkan kepada responden surat ikatan hak milik dengan pindah milik yang boleh didaftarkan berpihak kepada responden, MPM telah melanggari aku janji itu (lihat perenggan 45).

(6) MPM, selepas menyempurnakan PJB tersebut dengan pembeli-pembeli terdahulu dan menerima harga belian penuh, ialah pemegang amanah kosong. MPM oleh itu tidak dibenarkan di sisi undang-undang untuk menjual atau memindah milik tanah tersebut kepada pembeli-pembeli baru. Pemindahan berikut lot-lot tersebut oleh MPM kepada pembeli-pembeli baru dengan itu adalah tidak sah *ab initio*, kerana MPM tidak mempunyai apa-apa kapasiti yang dikehendaki atau sah untuk memasuki perjanjian-perjanjian tersebut (lihat perenggan 53–54).

(7) Tiada apa-apa dalam Kanun Tanah Negara ('KTN') yang menyatakan atau secara tersirat mengecualikan atau melarang apa-apa kepentingan saksama dalam tanah yang diberi milik. Mahkamah patut menberikan kesan kepada transaksi-transaksi komersial biasa dan tidak mentaksahkan apa-apa gadai janji saksama yang diwujudkan oleh kontrak-kontrak di luar mana-mana peruntukan statutori untuk pendaftaran hak milik di bawah KTN (lihat perenggan 65).

(8) Oleh kerana PJB tersebut yang berikutnya dengan pembeli-pembeli baru adalah tidak sah *ab initio* dan tidak berkuat kuasa, adalah diikuti bahawa borang pindah milik berkaitan (Borang 14A) juga tidak sah dan tidak berkuat kuasa untuk mewujudkan pindah milik yang boleh didaftar. Borang 14A dengan itu adalah surat cara yang tidak sah (lihat perenggan 70).

(9) Kegagalan di pihak responden untuk memasukkan kaveat dengan segera,

tidak dalam apa cara menidakkan atau menggagalkan hak, hak milik dan kepentingan berkaitan lot-lot tersebut (lihat perenggan 73–77); *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169; *Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330; *Chua Hee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480 dirujuk; *Jasalam (M) Sdn Bhd v Wong Koon Yee* [2000] 3 MLJ 115 dibeza.

(10) Borang 14A relevan berkaitan pindah milik hakmillik kepada perayu adalah surat cara tidak sah dan oleh itu hak milik dan kepentingan perayu dalam lot itu tidak boleh dipertikaikan ia boleh disangkal. Perayu ialah pembeli pertama lot yang dipersoalkan daripada pemilik berdaftarnya, MPM. Jika begitu perayu jelas tidak boleh menikmati manfaat proviso s 340(3) KTN. Jika mahkamah berpuas hati bahawa pindah milik hak milik kepada perayu timbul daripada surat cara yang tidak sah, secara automatik diikuti bahawa ia hendaklah diketepikan (lihat perenggan 82–85); *Tan Ying Hong v Tan Sian Son & Ors* [2010] 2 MLJ 1 dan *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768 dirujuk.

(11) Persoalan yang dikemukakan telah dijawab secara positif. Hak milik pemilik berdaftar yang merupakan pembeli pertama suci hati tanpa notis di bawah KTN boleh digagalkan oleh kepentingan saksama yang tidak didaftar pemberi milik mutlak di bawah PJB terdahulu berkaitan bidang tanah yang sama (lihat perenggan 86).]

Notes

For a case on breach of undertaking, see 3(3) *Mallal's Digest* (5th Ed, 2015) para 3499.

For a case on equitable mortgage in general, see 6(3) *Mallal's Digest* (5th Ed, 2015) para 2953.

For a case on equitable mortgage of interest in property, see 8(2) *Mallal's Digest* (5th Ed, 2015) para 3802.

For a case on securities for advances in general, see 1(3) *Mallal's Digest* (5th Ed, 2015) para 3103.

For cases on bare trust, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 4869—4144.

For cases on equitable mortgage under mortage, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 4129—4144.

For cases on land assigned to financier, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 2675—2679.

For cases on parties bound by pleadings, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7182—7189.

For cases on transfer of land, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 3788—3789.

For cases on validity of agreement, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 5432—5442.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241, FC (refd)

AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don [2012] 3 MLJ 1, FC (refd)

Anuar bin Mat Amin v Abdullah bin Mohd Zain [1989] 3 MLJ 313, HC (refd)

ARRM Arunasalam Chetty Son of Sithambaram Chetty v Teah Ah Poh Trading under The Style of Mun Seng Hin Kee; Teah Soo Chew Trading under The Style of Teah Chin Seng [1937] 1 MLJ 17 (refd)

Blay v Pollard and Morris [1930] 1 KB 628, CA (refd)

CPR v District Registrar of Dauphin Land Titles Office (1956) 4 DLR (2d) 518, CA (refd)

Chartered Bank, The v Yong Chan [1974] 1 MLJ 157, FC (refd)

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal [2004] 1 MLJ 353; [2004] 1 CLJ 357, CA (refd)

Chua Hee Hung & Ors v QBE Supreme Insurance Bhd [1990] 1 MLJ 480, SC (folld)

Chuah Eng Khong v Malayan Banking Bhd [1998] 3 MLJ 97; [1999] 2 CLJ 917, FC (refd)

Hadley v London Bank of Scotland (1865) 12 (LT) 747 (refd)

Haji Mohamed Dom v Sakiman [1956] 1 MLJ 45, CA (refd)

Jasalam (M) Sdn Bhd v Wong Koon Yee [2000] 3 MLJ 115, CA (distd)

Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768, FC (refd)

KEP Mohamed Ali v KEP Mohamed Ismail [1981] 2 MLJ 10, FC (refd)

Kiaw Aik Hang Co Ltd v Tan Tien Choy [1964] 1 MLJ 99, CA (refd)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)

Lysaght v Edwards (1876) 2 Ch D 499, Ch D (refd)

Mook Meng Sun v Lo Aa Kau & Ors [2002] 2 MLJ 193, HC (refd)

Ng Kheng Yeow v Chiah Ah Foo & Ors [1987] 2 MLJ 330, SC (refd)

Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [2002] 2 MLJ 513, FC (folld)

Puran Singh v Kehar Singh; Bahadur Singh [1939] 1 MLJ 71 (refd)

State Government of Perak v Muniandy [1986] 1 MLJ 490, SC (refd)

Tan Ying Hong v Tan Sian Son & Ors [2010] 2 MLJ 1, FC (folld)

Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45, FC (refd)

United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors [1976] 1 MLJ 169, FC (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)

FMS Land Enactment 1911

National Land Code ss 42(iii), 110, 180, 340, 340(1), (1)(b), (2), (2)(b),

(3), (a), (b), Borang 11A
Registration of Titles Enactment 1911
Rules of the High Court 1980 O 14A

Appeal from: Civil Appeal No A-02(IM)-2270–09 of 2011 (Court of Appeal, Putrajaya)

Ranjan N Chandran (Gobind Singh Deo and Joanne Chua Tsu Fae with him) (Ranjan Chitravathy & Nik) for the appellant.
Yoong Sin Min (Poh Choo Hoe with him) (Shook Lin & Bok) for the respondent.

Ramly Ali FCJ (delivering judgment of the court):

[1] This is an appeal against the concurrent findings of the High Court and the Court of Appeal allowing the respondent's claim against the appellant vide encl 62, pursuant to O 14A of the Rules of the High Court 1980 ('the RHC'). The appellant before us is one Samuel Naik Siang Ting who was the first defendant at the High Court while the respondent is Public Bank Bhd who was the plaintiff there.

[2] Leave to appeal to this court was granted to the appellant and two others, namely – Lee Soo Eng and Ti Moek Hua, on 19 June 2013. However, notice of appeal was filed only by the appellant. The others had not filed their notices of appeal and did not appear in court during the hearing of the appeal before us. Therefore, their appeals are deemed discontinued.

FACTUAL BACKGROUND

[3] This matter was dealt with summarily under O 14A of the RHC. Based on the statement of agreed facts the factual background leading to the present appeal before us are as follows.

[4] At all material time, Majlis Perbandaran Manjung ('MPM') (the sixth defendant at the High Court) was the registered proprietor of a piece of land held under master title HS(D) Dgs 11103, PT No 4108, Mukim Sitiawan, District of Manjung ('the land') before it was subdivided. The land was subsequently subdivided into various lots known as Lot 3, Lot 4, Lot 5, Lot 6 and Lot 7 ('the lots').

[5] MPM, vide a joint venture agreement dated 19 November 1998 appointed a company known as Bersatu Maju Properties Sdn Bhd ('BMP') (the tenth defendant at the High Court), as a developer to develop the land into a mixed development project including three storey shop offices thereon.

[6] Thereafter, on various dates (between 10 October 2001 and 21 January 2002) MPM and BMP executed various sales and purchase agreements in relation to the lots in favour of the following purchasers – namely, Mohd Yusoff bin Baharom ('Lot 3'); Ong Kee Chai and Ong Lai King ('Lot 4'); Wong Siew Ming ('Lot 5'); Ong Sang Huat Holdings Sdn Bhd ('Lot 6'); and Lim Peng Guan and Beatrice Veronica Arulappen ('Lot 7'). For the purpose of the present appeal, all the abovenamed purchasers are collectively referred to as 'the earlier purchasers'.

[7] The respondent, at the request of the earlier purchasers had granted loans to enable them to finance the purchase of the lots. For that purpose various letters of offer were issued and various loan agreements were executed between the respondent and the respective earlier purchasers.

[8] At the material time, when the sale and purchase agreements and the loan agreements were executed, the individual title for each of the lots had not been issued yet. Thus in order to facilitate the granting of the loans the earlier purchasers executed separate deeds of assignment whereby they assigned absolutely all their respective titles, rights to and/or interest in the lots in favour of the respondent. As an added security for the loans, MPM and BMP furnished the respondent with letters of undertaking, whereby MPM and BMP expressly undertook to deliver the documents of title to the lots, upon issuance thereof, to the respondent to facilitate the execution of the relevant memorandums of transfer in favour of each of the earlier purchasers and the execution of legal charges in favour of the respondent.

[9] On the strength of all the loan agreements, the deeds of assignment and the letters of undertaking, loans were granted and duly disbursed in full to BMP as the purchase price for the lots in question.

[10] Unknown to the respondent, the land (comprising of the lots) was subsequently subdivided and temporary documents of title were issued by the Registrar of Land Title, Perak on or about 27 June 2003. MPM and BMP failed to notify and deliver the individual documents of title to the respondent as agreed in their letters of undertaking. Sometimes in November 2004, the respondent discovered that MPM and BMP had sold the lots to the first to fifth defendants (including the appellant herein), and executed various sale and purchase agreements with them (the new purchasers). The title to the lots were then transferred to and registered in the name of the new purchasers, including the appellant.

[11] Upon such discovery, the respondent, lodged private caveats on the lots. In the meantime, the earlier purchasers defaulted in the repayments of their

loans to the respondent. The respondent commenced civil suits against each of them and accordingly obtained judgment against them.

AT THE HIGH COURT

[12] The respondent commenced the present action on 26 July 2007 against MPM, BMP and the new purchasers, asking, inter alia, for:

(a) a declaration that the earlier purchasers were the rightful owners of their respective lots;

(b) a declaration that the respondent was the legal assignee of the titles and interests to the lots by virtue of the deeds of assignment dated 16 October 2001, 30 November 2001, 13 December 2001 and 22 January 2002 which was executed by the earlier purchasers in favour of the respondent;

(c) a declaration that the subsequent sale and purchase agreements dated 22 Mac 2004 and 11 January 2005, between MPM and BMP with the new purchasers (defendants 1, 2, 3, 4 and 5) were void; and

(d) a declaration that the transfers of the lots to the new purchasers were void ab initio and that the registration of such transfers be set aside.

The respondent also prayed for other consequential reliefs and damages to be awarded.

[13] A default judgment was entered against BMP, and a consent judgment was recorded against MPM. With regard to the other defendants (the new purchasers), the respondent applied for judgment summarily pursuant to an O 14A application. As indicated in his affidavit-in-reply to encl 62, the appellant (as the first defendant) agreed with the respondent that the matter could be dealt with summarily under O 14A and need not go for full trial.

[14] The legal questions for determination in the O 14A application were as follows:

(a) whether the respondent is an equitable mortgagee having an absolute assignment of rights, titles and interests in the lots under the sale and purchase agreements;

(b) whether the subsequent sales and/or conveyances of the lots by MPM and BMP to the new purchasers are void ab initio;

(c) whether the alleged registered titles of the first defendant (the appellant herein), second and third defendants in Lots 5, 6 and 7 are defeasible and hence, liable to be set aside; and

(d) whether the fourth and fifth defendants have any caveatable interest in Lots 3 and 4.

[15] On 27 July 2011, the High Court after hearing the parties answered all the questions in favour of the respondent and accordingly allowed the respondent's claims. The High Court made various orders in favour of the respondent (in Bahasa Malaysia), the effects of which can be summarised as follows:

(a) a declaration that the earlier purchasers were the rightful owners of the lots in question;

(b) a declaration that the plaintiff (the respondent herein) was the legal assignee of the titles and interests to the said property by virtue of the various deeds of assignment dated 16 October 2001, 30 November 2001, 13 December 2001 and 22 January 2002;

(c) a declaration that the sale and purchase agreements dated 22 March 2004 and 11 January 2005 entered into by the first, second, third, fourth and fifth defendants (the new purchasers) and the sixth and tenth defendants (MPM and BMP) are void and set aside;

(d) a declaration that the transfers of the lots to the first, second, third, fourth and fifth defendants were void ab initio; and all the defendants are to surrender their respective documents of title to the lots within seven days from the date of this order;

(e) an injunction to prohibit the first, second, third, fourth and fifth defendants or their respective agents from entering into any dealings to sell, transfer, charge, lease and to carry out any physical activities on the said property; and

(f) that MPM be ordered to take steps to cancel the new purchasers' names in the respective documents of title and to effect registration of the earlier purchasers as the rightful owners of the lots; failing which, the registrar shall carry out the order within seven days from the date of its written notification.

AT THE COURT OF APPEAL

[16] The appellant and two other defendants then appealed to the Court of Appeal against the above decision. On 22 March 2012, the appeal was unanimously dismissed with costs. In affirming the decision of the High Court, the Court of Appeal made, inter alia, the following findings:

(a) that the earlier purchasers have assigned absolutely all their rights, titles and interests under the sale and purchase agreements of the lots in question to the respondent; and the deeds of assignment are treated as

equitable mortgages and the respondent is an equitable mortgagee of the earlier purchasers rights, titles and interests in respect of the lots;

(b) that the subsequent sales, transfers and conveyance of the lots by MPM and BMP to the new purchasers (including the appellant) without the respondent's consent are void ab initio; because:

(i) upon receipt of the full payment of the purchase price on 13 February 2003, MPM being the registered owner became a bare trustee and has no right to deal with the lots;

(ii) that as a bare trustee, MPM does not have any legal or requisite capacity to enter into the sale and purchase agreements dated 22 March 2004 and 11 January 2005 with the new purchasers;

(c) that since the sale and purchase agreements with the new purchasers (including the appellant) and the instruments of transfer are void, it follows that the purported registered titles to the new purchasers (including the appellant) in the lots are defeasible and ought to be set aside by virtue of s 340(2)(b) of the National Land Code 1965 ('the NLC'); and

(d) that s 340(3) of the NLC did not confer any protection to the first and third defendants who claimed that they were the immediate purchasers of Lots 5 to 7. The registered titles of the first and third defendants for Lots 5 to 7 ought to be set aside.

LEAVE QUESTION

[17] Dissatisfied with the Court of Appeal's decision, the appellant together with two other defendants filed an application for leave to appeal to this court. On 19 June 2013, this court granted leave to appeal on the following question:

> whether the title of bona fide registered owner without notice under the NLC can be defeated by a non-registered interest of an assignee/lender under an earlier sale and purchase agreement in respect of the same piece of land with other purchasers other than the 1st Applicant.
>
> However, as we have said notice of appeal was filed only by the appellant and the appeals by the others are deemed discontinued.

THE APPELLANT'S SUBMISSIONS

[18] Before us, learned counsel for the appellant submitted that, on the undisputed facts of the case, the decision of the High Court was erroneous, and in consequence the decision of the Court of Appeal, affirming the High Court decision, was also wrong.

[19] Learned counsel also submitted that 'in the year 2004, following the subdivision of the subject property, and the individual titles issued there for the appellant purchased the subject land from MPM, the registered proprietor of the subject property and BMP, the developer, named the vendor in the sale and purchase agreement; and following the transfer executed in the prescribed form the appellant became the registered proprietor of the subject land on the 6 December 2004'.

[20] Learned counsel further submitted that the respondent lodged its private caveats relating to its loan agreements with the earlier purchasers only in 2005. When the appellant purchased his lot in 2004, the registered proprietor of the lot was MPM and there was no other impediment for the purchase and the subsequent transfer of the lot to the appellant. Therefore, the respondent has only itself to blame for having lost its priority over the lot and for its failure to protect its interest immediately after the loan agreements were executed with the earlier purchasers.

[21] It is also submitted by learned counsel that in purchasing the lot from MPM, the appellant had no knowledge whatsoever of the earlier transactions involving the earlier purchasers; and therefore by virtue of the registration, the appellant had acquired a legal interest (not merely an equitable interest) and an indefeasible title in the lot. The appellant claimed that he was a bone fide purchaser without notice who had paid the full purchase price as valuable consideration, and therefore his title over the lot could not be defeated by the respondent's non-registered interest under the earlier sale and purchase agreements with the earlier purchasers in respect of the lots.

THE RESPONDENT'S SUBMISSIONS

[22] The respondent, on the other hand, argued that the appellant's registered title in the lot was not indefeasible under s 340 (2)(b) of the NLC and ought to be set aside as the registration was done by means of an 'insufficient or void instrument'. The respondent further argued that at the time when the appellant executed his sale and purchase agreement in respect of the lot on 22 March 2004, the earlier purchasers (as borrowers of the loans granted by the respondent) were fully vested with the rights, titles and interests to the lots, and such rights, titles and interests have been absolutely assigned to the respondent vide the deeds of assignment duly executed by them.

[23] The respondent further argued that since MPM and BMP as the vendor had received the full purchase price from the earlier purchasers (as disbursed by the respondent), MPM had become a bare trustee to the lots for the earlier purchasers, and later by virtue of the deeds of assignment, for the respondent; and therefore MPM was not in a capacity to subsequently sell or transfer the

lots to the appellant and the other new purchasers. Thus MPM was not permitted to enter into the sale and purchase agreements with them in respect of the lots.

[24] The respondent contended that the relevant Form 14A in respect of the transfers of the titles to the lots to the new purchasers (including the appellant) were consequently void and there can be no rights, titles or interests conveyed to the new purchasers. As a bare trustee, MPM was no longer vested with the rights to the lots and as such did not have any legal authority to execute the sale and purchase agreements. The appellant's title was therefore defeasible. The respondent argued that being an immediate purchaser the appellant was precluded from availing himself to the protection under the proviso to s 340(3) of the NLC and the title ought to set aside pursuant to s 340(1)(b) of the NLC.

[25] On the issue of the failure to lodge a caveat, the respondent submitted that a caveat does not create any interest or encumbrance in land; and the respondent's rights as equitable mortgagee of the said lots are not prejudiced by the absence of private caveat lodged by the respondent.

[26] The respondent, therefore, urged this court to answer the leave question in the affirmative and to dismiss the appeal with costs.

THE APPELLANT'S UNPLEADED ISSUE

[27] Based on the pleadings as well as the statements of agreed facts between the parties, at the time when MPM entered into the sale and purchase agreements with the earlier purchasers on various dates between 10 October 2001 and 21 January 2002, MPA was the registered proprietor/owner of the land in question. This fact has been agreed upon and not disputed at all at the High Court, the Court of Appeal as well as during main submissions before us in the present appeal. Even during the respondent's application for an O 14A proceeding at the High Court, the appellant had clearly indicated to the truth of the fact that MPM, at the material time, was the registered proprietor/owner of the land when the sale and purchase agreements were executed with the earlier purchasers. Being an agreed issue, this point of MPM being a registered owner was not raised at all by either party at the High Court as well as at the Court of Appeal or even at the stage of the main submissions of the present appeal before us. Neither was it mentioned in the written submissions by both counsel filed before us. It was only during submission-in-reply before us that the co-counsel for the appellant, Mr Gobind Singh Deo raised this new issue by drawing our attention to Borang 11A *(Suratan Hak milik Sementara), Kanun Tanah Negara* in respect of the land in question (at pp 107–109 of the *Rekod Rayuan Jld 2*), where he claimed that there was an endorsement to show that at the time when the respective sale and purchase agreements were executed

between MPM and the earlier purchasers between 10 October 2001 and 21 January 2002, MPM was not the registered proprietor/owner of the land and thus had no right to deal with it, as the land had earlier been surrendered and vested in the state authority on 3 September 2000. Therefore counsel claimed that the sale and purchase agreements as well as the deeds of assignments executed by the earlier purchasers were void and invalid.

[28] This is totally a new issue raised by the appellant's co-counsel before us at the submission-in-reply stage. It was not pleaded at all. It went against the pleaded case of the appellant himself (as well as the respondent) that at the material times, MPM was the registered proprietor/owner of the land and that the existence of the sale and purchase agreements with the earlier purchasers, the deeds of assignment in favour of the respondent as well as the letters of undertaking issued by MPM and BMP in favour of the respondent were not disputed at all. Clearly, the respondent was caught by surprise.

OUR FINDINGS ON THIS ISSUE

[29] It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see *State Government of Perak v Muniandy* [1986] 1 MLJ 490; and *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313). In *Blay v Pollard & Morris* [1930] 1 KB 628, Scrutton LJ ruled that: 'Cases must be decided on the issues on the record; and if it is desired to raise other issues there must be pleaded on the record by amendment'.

[30] The Supreme Court in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, had also emphasised the importance of pleadings and ruled that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal (see also *AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don* [2012] 3 MLJ 1 (FC)).

[31] On the same issue, HRH Raja Azlan Shah FJ (as HRH then was) in *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157, had also pointed out that 'as the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and new trial ordered' (see also *Haji Mohamed Dom v Sakiman* [1956] 1 MLJ 45; and *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] 1 MLJ 99).

[32] Based on the above observation and principle, we are of the view that the 'last minute' issue raised by Mr Gobind Singh Deo, co-counsel for the appellant, that at the time when the sale and purchase agreements with the earlier purchasers were executed, MPM was not the registered

proprietor/owner of the land must be disregarded and not to be considered at all in determining the appeal before us. In doing so, we adopt the observation by HRH Raja Azlan Shah CJ (as HRH then was) in *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the Defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be a great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

[33] The issue raised, if accepted, would completely change the character of the appellant's defence to the respondent's claim and would be highly prejudicial to the respondent's case.

[34] For the purpose of the present appeal, we will only consider the pleaded case of the parties before us. To borrow the words of Gopal Sri Ram JCA in *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 CLJ 357, '... once a defendant takes that course, he must stand and fall on his pleaded case; we cannot simultaneously put forward an unpleaded case ... '.

[35] In the premise, we are of the view that the respective sale and purchase agreements executed by MPM, BMP and the respective earlier purchasers as agreed in the pleadings are valid and enforceable in law. It follows that all the related deeds of assignment executed by the earlier purchasers in favour of the respondent as well as the letters of undertaking issued by MPM and BMP in favour of the respondent and the loan agreements executed by the earlier purchasers and the respondent are also valid and enforceable in law.

DEEDS OF ASSIGNMENT

[36] Clause 1 of the deeds of assignment, provides that the appellant as the borrower and the assignor, 'hereby ASSIGNS ABSOLUTELY to the Bank the full and entire benefit of the Assignor's rights title and interest whatsoever in and to and under the Sale and Purchase Agreement and the Related Document (s) and in the said Property together with the Assignor's right of enforcement thereof or thereunder as security for the said Loan'.

[37] It also provides that 'the Assignor shall and hereby undertakes to continue to observe perform and be bound by all whatever conditions covenants and stipulations therein ... contained in the Sale and Purchase Agreement, the Related Document (s) and as contained in the Loan Agreement'.

[38] Under cl 3(a) thereof, if the assignor shall commit a default pursuant to the terms of the deed or if any of the events of default in the loan agreement shall happen or at any time after the loan secured shall have become immediately repayable to the respondent under the loan agreement, the respondent shall be entitled without notice to the assignor 'to enter upon and take possession of the said property or any part or parts thereof and to deal with all the rights and interest of the Bank in relation to the said property or otherwise in all respect as the person absolutely and beneficially entitled thereto'.

[39] At the time when the loan agreements were signed, the earlier purchasers had no legal ownership to the lots as the land had not been subdivided and the documents of title had not been issued. The deeds of assignment executed in favour of the respondent were expressly for the purpose of securing the loans given to the earlier purchasers to purchase the lots.

[40] We agree with the Court of Appeal that the deeds of assignment in the present case are treated as equitable mortgages (where the respondent was an equitable mortgagee) of the earlier purchasers' rights, titles and interests under the sale and purchase agreements.

[41] The law on assignment is governed by s 4(3) of the Civil Law Act 1956, which provides:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the rights of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[42] The effect of an absolute assignment was explained at length by the Federal Court in *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97 at p 109; [1999] 2 CLJ 917 at p 920 as follows:

> At common law and under the relevant rules of equity, the said loan agreement would amount to an equitable mortgage because the assignment of the right, title and interest in the said land was expressly or obviously for the purpose of securing the loan given to the borrower to purchase the said land. The said loan agreement is not an out-and-out purchase of the said land. This view is reinforced by the promise that when the document of title of the said land was available after the completion of the subdivision aforesaid, the borrower would execute a charge in favour of the lender according to the provisions of the National Land Code (hereinafter called

'the Code'). It is true that nowhere in the said loan agreement has the word 'mortgage' been used, but it is a security transaction in connection with the loan given by the lender with a provision for repayment after which, the borrower 'shall be entitled ... to obtain a discharge and release of the said lot from the Lender', (see cl 27 of the said loan agreement). Thus we have the loan, the contractual right to repay or to redeem the said land and the assignment of all 'right title and interest' in the said land pending the exercise of such contractual right to redeem. The said loan agreement therefore, at common law, will be a mortgage. It would be an equitable mortgage (and not a legal mortgage) because the borrower at the time of signing the said loan agreement had no legal estate (or registered proprietorship of a grant of land etc) but only an equitable interest as a purchaser by contract from a housing developer, pending the issuance of a separate document of title aforesaid. In other words, it is a mortgage in equity for which the actual form of words is immaterial provided the meaning is plain when interpreting a document as a mortgage or equitable mortgage, see *William Brandt's Sons and Co v Dunlop Rubber Co Ltd* [1905] AC 454, at p 462.

[43] As the loan agreement with the appellant is in law an equitable mortgage, it follows that the respondent in the present case became an equitable mortgagee. In the *Law of Real Property* (5th Ed) by Sir Robert Megarry and HWR Wade at p 914, the learned authors state that 'a mortgage is a conveyance of property legal or equitable subject to a right of redemption'. This concept of equitable mortgage has been recognised by the Federal Court in *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513, where it was held:

All things considered, we were more inclined to agree with learned counsel for the Appellant, in particular with his submission that in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realise its security under an absolute assignment of rights to land, the court should give effect to and recognise the contractual rights as determined between the vendor and the purchaser.

[44] We are in full agreement with the above principle. In the present case, the loan was fully disbursed by the respondent by 13 February 2003 to the developer (BMP), and the earlier purchasers, as the borrowers in the loan agreements defaulted in their repayments of the loans as stipulated under cl 1.1 thereof, thus triggering an event of default under cl 30.1. That being the case, the respondent was entitled to invoke cl 3(a) of the deeds of assignment ie 'to deal with all the rights and interest in relation to the said property absolutely and beneficially'.

[45] To strengthen the respondent's rights and interests on the lot, MPM and BMP had issued letters of undertaking in favour of the respondent. In the said letters of undertaking dated 13 December 2001, MPM consented to the deeds of assignment issued by the earlier purchasers in favour of the respondent and

undertook to take all reasonable steps to obtain separate issue documents of title to the land and, subsequently, to deliver to the respondent 'the separate document of title to the said property upon issue thereof together with the registrable transfer in favour of the assignor or any other documents as shall be incumbent upon us to produce to secure the registration of the assignor as the registered proprietor of the said Property within six (6) months from the date hereof'. The terms of the undertaking are clear and unambiguous. Therefore, both MPM and BMP are legally obliged to honour their undertakings.

BARE TRUSTEE

[46] It is not in dispute that the land was subsequently subdivided into various lots and temporary documents of title in respect of the lots were issued by the Registrar of Land Titles, Perak on or about 27 June 2003. MPM and BMP failed to notify the respondent, and to deliver to the respondent the documents of title with the registrable transfer in favour of the respondent as agreed in their letters of undertaking. In fact, the lots were sold to third parties (including the appellant) after the relevant documents of title were issued. Upon discovery of the subsequent sale, the respondent lodged private caveats on the lots. Clearly, MPM had committed a breach of the undertakings given earlier in favour of the respondent.

[47] As indicated earlier, there were valid sale and purchase agreements in respect of the lots between MPM, BMP and the earlier purchasers. In law, the lots had already been sold by MPM and BMP to the earlier purchasers, who had paid the full purchase price by 13 February 2003. Therefore the earlier purchasers were fully vested with the rights, titles and interests to the lots which rights, titles and interests were in turn absolutely assigned to the respondent as the lender.

[48] In this regard, Jessel MR in *Lysaght v Edwards* (1876) 2 Ch D 499 had the occasion to explain the meaning of the term 'valid contract' or 'valid agreement' in a sale transaction and its effect in law. At p 507 of the report, His Lordship said 'Valid Contract means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser a contract binding on both parties'.

[49] It was clearly stated in that case that the effect of a contract for sale has been settled for centuries. At p 506, His Lordship explained the following legal doctrine:

> It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of

the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest).

[50] His Lordship (in *Lysagh*'s case) also adopted an earlier authority where Lord Justice Turner in *Hadley v London Bank of Scotland* (1865) 12 (LT) 747 held:

I have always understood the rule of the Court to be that if there is a clear valid contract for sale the Court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by lis pendens. I think this rule well founded in principle, for the property is in equity transferred to the purchaser by the contract; the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him.

[51] Back home, the above principle had been adopted and followed by the Federal Court in *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 where it was held:

The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the Appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.

[52] In that case, the Federal Court concluded:

We are of the view that the vendors, having parted with their interest in the land to the appellants, are bare trustees and have no interest in the land over which a valid caveat can be lodged.

(See also *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116; and *Hon Ho Wah & Anor v United Malayan Banking Corpn Bhd* [1994] 2 MLJ 393).

[53] We are in full agreement and adopt the above well founded principles of law which, according to Jessel MR in *Lysaght*'s case, 'has been settled for centuries'. Applying the said principles to the facts of the present case before us, we hold that MPM, being the registered proprietor of the land after executing the sale and purchase agreements with the earlier purchasers and having received the full purchase price, was a bare trustee (that is, a person without beneficial interest in the property); and to borrow the words of Jessel, MR in *Lysaght*'s case ' ... the court will not permit the vendor afterwards to transfer the legal estate to a third person'. In other words, MPM in the present case, was therefore not permitted in law to sell or transfer the land to the new purchasers (including the appellant).

[54] The Court of Appeal was right in finding that MPM, after having entered in the sale and purchase agreements with the earlier purchasers and received the full payments of the purchase price, had become a bare trustee and as such was not permitted to deal with the lots. We are in agreement with the Court of Appeal that the subsequent sales, transfers or conveyances of the lots by MPM to the new purchasers (including the appellant) were void ab initio, as MPM did not have any legal or requisite capacity to enter into such agreements.

INDEFEASIBILITY OF TITLE AND INTEREST – SECTION 340 OF THE NLC

[55] It is not in dispute that in the year 2004, after the land had been subdivided and documents of title issued, MPM and BMP entered into subsequent sale and purchase agreements with the new purchasers (including the appellant). The appellant claimed that he had no knowledge whatsoever of the earlier dealings in respect of the land. The appellant had paid the full purchase price for the said purchase and a prescribed transfer form (Form 14A) was executed in his favour on 30 September 2004. The appellant claimed that he became the registered proprietor of the lot purchased by him when the transfer form was registered on 6 December 2004. At the material time the respondent had not lodged any caveat on the land following its loan agreements with the earlier purchasers. The respondent only lodged its private caveats in the year 2005 after realising the fact relating to the sales and transfers of the lots to the new purchasers (including the appellant) by which time they had already become the registered proprietors of the lots.

[56] The appellant argued that as at the date of his registration as the registered proprietor of the lot (on 6 December 2004) there was absolutely no impediment to the sale and transfer of the lot and the registration of its title in his favour. The appellant further claimed that by virtue of the registration of the title to his name, he had acquired a legal interest in the lot (which was a registered proprietor and not merely an equitable interest) and therefore such legal interest which was acquired by him must necessarily take precedence over any unregistered equitable interest that the respondent may possibly have in the lot.

[57] The appellant submitted that in the circumstances his interest in the lot was indefeasible and must stand indefeasible under s 340 of the NLC. The respondent, on other hand claimed that the appellant's sale and purchase agreement with MPM in respect of the lot was ineffective and incapable of conferring any rights to him as the relevant transfer form (Form 14A) in respect of the lot which was executed by MPM pursuant to the void sale and purchase agreement, was also invalid and therefore no interest could be conveyed

through it to the appellant. The respondent claimed that the said Form 14A was an 'insufficient or void instrument'. A

[58] The issue of indefeasibility of title and interest in alienated land is governed by s 340 of the NLC. Section 340(1) provides: B

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

C

[59] The exceptions to the above rule are spelt out in s 340(2) which provides:

> (2) The title or interest of any such person or body shall not be indefeasible –
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> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or D
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> (b) where registration was obtained by forgery, or *by means of an insufficient or void instrument*; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. E

[60] Section 340(3) provides for situations where a defeasible title or interest can be set aside, subject to who and an exception in the proviso where the title or interest is acquired by any purchaser in good faith and for valuable consideration. The subsection reads: F

> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstance specified in subsection (2) –
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> G
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> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested.
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> H
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> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[61] The question for determination before us brings into focus the statutory rights of a registered land proprietor/owner as conferred by the statutory provisions under s 340 of the NLC as against an equitable right of an unregistered interest of an assignee or lender under an earlier sale and purchase agreement and deed of assignment in respect of the same piece of land. I

[62] The question as to what extent the rules of equity are recognised and applied by our courts was explained by the Federal Court in *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97; [1999] 2 CLJ 917, where it was held that 'Rules of equity in general are applicable by virtue of the Civil Law Act 1956 and those rules of equity relating to equitable interests in land have no doubt always been recognised and applied in Malaysia unless they are expressly or by necessary implication precluded by the Code ... This view has been asserted and reasserted in a number of cases in the appellate courts in Malaysia'.

[63] The issues of 'equitable interest in land' and 'equitable mortgagee' had been dealt with in *ARRM Arunasalam Chetty Son of Sithambaram Chetty v Teah Ah Poh Trading under The Style of Mun Seng Hin Kee; Teah Soo Chew Trading under The Style of Teah Chin Seng* [1937] 1 MLJ 17, where the Court of Appeal then, unanimously held that the deposit of the documents of title as security for repayment of debts, operated as an equitable charge by virtue of which the party who lent the money acquired an equitable interest in the land covered by the document of title. It was also held that the creditor therein was also an equitable mortgagee by the deposit of the document of title and decided that the security did not contravene the provisions of the Kedah Land Code, which was based on the FMS Land Enactment 1911 and the Registration of Titles Enactment 1911, all in fact based on the Torrens system of registration of titles.

[64] It is also appropriate refer to a passage in the judgement of by Terrell, Ag CJ (FMS) in that case (*Arunasalam Chetty*) where at pp 21 and 23, His Lordship said:

> The learned Judge of the First Division appears to consider that the proviso makes equitable principles inapplicable in cases of immoveable property. But there is nothing in the Land Code which so provides. An equitable mortgage by deposit is not a charge contravening the express terms of the Land Code; it is a form of security quite outside the Land Code to which effect may be given as a contract inter parties, and which can only be implemented by means of an order of Court. That such interests may exist as contracts inter personas, and quite outside any registration of titles enactment is fully recognised by the Privy Council in the case of *Abigail v Lapin* [1934] AC 491, the principle of which decision was recently adopted by the FMS Court of Appeal in the case of *AMM Murugappa Chetty v S Seenivasagam and Others* (1936) FMSLR 33: [1936] MLJ 217
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> ...
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> It is the duty of the Court to do justice between parties, and unless expressly prohibited by Statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds. Registration of titles was introduced to prevent fraud, but to use it for the purpose of prohibiting, or rendering nugatory, ordinary commercial transactions not expressly covered by the Enactment, is to enable the Enactment to be used as an instrument of fraud. Even in the Federated Malay States, therefore, the Courts have found themselves

constrained again and again to apply equitable principles, not because English equitable principles apply, but because the application of such principles is in accordance with natural justice. I would refer in particular to the case of *Boase v Cluny Rubber Estates Ltd, and Others*, 2 FMS Law Reports p 130 and the more recent case of *Arumugam v The Motor Emporium* (1933-34) FMSLR 21; [1933] MLJ 276.

[65] There is nothing in the NLC which expressly or by necessary implication excludes or prohibits any equitable interest in alienated land, and the court ought to give effect to ordinary commercial transactions and not to invalidate any equitable mortgage created by contracts outside any statutory provisions for registration of title under the NLC.

[66] Under s 340(2)(b), the title or interest of any person for the time being registered as proprietor of any alienated land shall not be indefeasible where the registration was obtained by means of an insufficient or void instrument.

[67] In '*Tenure and Land Dealings in the Malay States*' by David SY Wong, at p 364 the author explained the phrase 'insufficient or void instrument' for the purpose of s 340(2)(b) of the NLC as follows:

(iv) 'Insufficient or void instrument'

Section 340(2)(b) also provides that a registered title is defeasible where registration was obtained 'by means of an insufficient or void instrument'. Unlike 'forgery', the expression 'insufficient or void instrument' is so wide as to defy comprehensive enumeration of the circumstances in which a purportedly executed instrument of dealing may be regarded by the court as 'insufficient' or 'void'. Some general observations may indicate how wide its domain may be. The reference to the insufficiency and voidness of an instrument could pertain to all sorts of circumstances and matters relating to the execution of the instrument. Where the instrument is executed in pursuance of a contract of dealing, the invalidity of contract (ie where the contract is void) would plainly entail that the instrument is void accordingly. The instrument may also be 'insufficient' or 'void' for reasons relating to the capacity of the parties concerned, or by reason of some formal defect or irregularity. In addition, non-compliance with relevant statutory requirements may also result in the instrument being regarded as 'insufficient' or 'void'.

[68] The same issue was dealt with by our court in *Puran Singh v Kehar Singh; Bahadur Singh* [1939] 1 MLJ 71 where it was held that the memorandum of transfer in that case was not signed by an authorised attorney as required under ss 110 and 180 of the relevant land code and therefore the said memorandum of transfer was declared to be an insufficient instrument and that the registration by means of the transfer was void by virtue of the proviso of s 42 (iii) of the relevant land code which provides that: 'If the registration of any proprietor, chargee or lessee has been obtained by forgery or by means of an insufficient or void instrument, such registration shall be void'.

[69] The appellant argued that the respondent's contention that his registered title or interest in the subject lot was defeasible because its registration was obtained by means of insufficient or void instrument was very seriously flawed on the facts of the matter as well as the law on the ground that there was nothing to suggest and there was no evidence to show that the relevant Form 14A was an insufficient or void instrument within the meaning of s 340(2)(b) of the NLC. The appellant cited the decision of the High Court in *Mook Meng Sun v Lo Aa Kau & Ors* [2002] 2 MLJ 193, where Abdul Aziz J held that for an instrument to be regarded as an insufficient or void instrument, there must be something about the instrument itself that renders it insufficient or void. However in that case, as a matter of fact, the learned judge found that there was no evidence as to that as regards the instrument of transfer.

[70] In the present case, as we have shown earlier the undisputed facts of the case clearly show that the sale and purchase agreements as well as the deeds of assignment with the earlier purchasers are valid and enforceable; and the subsequent sale and purchase agreements with the new purchasers (including the appellant) are void ab initio and of no effect. It follows that their related transfer forms (Form 14A) must also be void and ineffective to create a registrable transfer. The agreed and undisputed facts of the case support the finding that there is sufficient evidence to show that the said Form 14A was in fact a void instrument.

FAILURE TO LODGE CAVEAT

[71] The appellant also touched on the respondent's failure to lodge its private caveats following its loan agreements with the earlier purchasers timeously so as to protect its interest in respect of the dealings in the lots. The appellant contended that the respondent, by its own indolence and omission had itself to blame for having lost its priority over the lots in question; and such failure was fatal to its case. He cited the case of *Jasalam (M) Sdn Bhd v Wong Koon Yee* [2000] 3 MLJ 115 to support his contention that 'the respondent, although being the first in time acquiring the equitable ownership to the land, has lost his priority by his indolence and omission to enter a caveat within reasonable time'.

[72] Under the Torrens system, caveat is devised for the protection of non-registrable interest on alienated land by allowing the caveator to be notified thereon in some manner. A caveat (so long as it continues in force) has the effect that the land in question shall not be transferred, charged or leased by the proprietor until such notice shall have been served on the caveator. The NLC allows a person or body of persons to lodge a private caveat for the protection of his caveatable interest which he claims he is entitled to. The right

to lodge a caveat is not dependent on the validity of the particular interest claimed. It is the claim of an interest within the category of caveatable interest that alone matters (see '*Tanure and Land Dealings in the Malay States*' by David SY Wong at p 418).

[73] It must be emphasised here that in law, a caveat does not create any rights or interest. This was explained by Tritscher J in *CPR v District Registrar of Dauphin Land Titles Office* (1956) 4 DLR (2d) 518 in the following words:

> It is trite law that caveats are to be used for the protection of alleged as well as proved interests and that a caveat is merely a warning which creates no new rights but protects existing rights, if any.

(see also *Chua Hee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480).

[74] The proposition was lucidly affirmed and adopted by Suffian LP in *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169, where it was held that an equitable interest in land was not affected by the absence of a caveat, 'as a caveat in itself does not create an interest but merely gives notice to the world of the presence of an interest belonging to someone other than the registered proprietor'.

[75] In *Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330, the Supreme Court held that even though the respondent (in that case) failed to lodge a caveat, it did not deprive him in having a better equity against the appellant (in that case) who had lodged a caveat; the reason being that the appellant had nothing to caveat as the vendors had already sold all his interest to the respondent there.

[76] Lee Hun Hoe CJ (Borneo), in delivering the Supreme Court's judgment in *Chua Hee Hung & Ors* reaffirmed the proposition as follows:

> In our judgment, the appellants' failure to lodge private caveats to protect their beneficial interests in the lands does not advance the case of the respondents inasmuch as the prohibitory order could not override the beneficial interest of the appellants in the properties attached. Moreover, the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent or until the caveat is removed by a court order.

[77] Adopting the above principle to the facts of the present case before us, we find that the failure on part of the respondent to lodge a caveat timeously, does not in any way negate or defeat its equitable rights, title and interests in respect of the lot in question.

[78] The case of *Jasalam (M) Sdn Bhd* as cited by the appellant earlier can be

distinguished. The issue in that case is different from the issue in the present case. There, the Court of Appeal was considering, inter alia, the priority of two parties with valid equitable interest in the land in dispute. In that case, the Court of Appeal followed the principle established in an Australian case of *Butler v Fairclough*, 23 CLR 78, that in 'the case of a contest between two equitable claimants, the first in time, all other things equal, is entitled to priority'.

[79] In our view the principle as adopted in *Jasalam (M) Sdn Bhd* cannot be applied to the present case for the simple reason that in the present case we are not dealing with two parties with valid equitable interests in the land in question; but with one party (ie the respondent) who claimed to have an equitable interest in the said land as against the other party (ie the appellant) who had purchased the lot based on a void and invalid sale and purchase agreement and later registered his title thereto based on a void instrument, rendering his title defeasible under s 340 (2)(b) of the NLC.

PROVISO TO SECTION 340(3) OF THE NLC

[80] The issue of the proviso to s 340(3) of the NLC was also raised before us. The appellant claimed that he was a bona fide purchaser for valuable consideration and therefore by virtue of the proviso to s 340(3) of theNLC , his title to the land was indefeasible.

[81] The proviso reads:

> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or any person or body claiming through or under such a purchaser.

[82] The issue of the applicability of the proviso was dealt with at great length by the Federal Court in *Tan Ying Hong v Tan Sian Son & Ors* [2010] 2 MLJ 1. In that case, the court ruled, inter alia, as follows:

(a) that the said proviso is not applicable to other subsections in s 340 of the NLC; it is only applicable and directed to sub-s (3) alone and not the earlier sub-sections; and

(b) that even though ss 340(3)(a) and (b) make reference to the circumstances specified in the earlier s 340(2), they are restricted only to subsequent transfer of the land in question; so it could not apply to the immediate transferee of any title or interest in the land.

[83] It is pertinent to note that, in that case *(Tan Ying Hong)* the Federal Court overuled its earlier decision in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 on the ground that the Federal

Court in *Adorna Properties* had erroneously misconstrued ss 340(1), (2) and (3) of the NLC and came to a wrong conclusion that the proviso to sub-s (3) applied equally to s 340(2). At paras 51, 52 and 53 or the judgment, Arifin Zakaria CJ (Malaya) (as he then was) said:

> [51] We are of the view that the proviso is directed towards the provision of sub-s (3) alone and not to the earlier subsection. This in our view is supported by the use of the words 'in this subsection' in the proviso. Therefore, its application could not be projected into the sphere or ambit of any other provisions of s 340.
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> [52] Furthermore, even though sub-s (3)(a) and (b) refer to the circumstances specified in sub-s (2) they are restricted to subsequent transfer or to interest in the land subsequently granted there out. So it could not apply to the immediate transferee of any title or interest in any land. Therefore, a person or body in the position of Adorna Properties could not take advantage of the proviso to the sub-s (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s (3) ought not to be extended as was done by the court in Adorna Properties, to apply to sub-s (2)(b). By so doing, the court had clearly gone against the clear intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.
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> [53] For the above reasons, with respect, we hold that the Federal Court in Adorna Properties had misconstrued s 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s (3) equally applies to sub-s (2). By so doing, the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s 340 of the NLC.

[84] The principle established in *Tan Ying Hong* was adopted and followed by this court in a recent case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768 where at para 43, Jeffrey Tan FJ said:

> In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were bona fide purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from Tan Ying Hong that the bona fides of an immediate purchaser is not a shield to defeasibility. The defeasible title of a bona fide immediate purchaser is still liable to be set aside. The defeasible title of a bona fide immediate purchaser only becomes indefeasible when it is subsequently passed to a bona fide subsequent purchaser. That the fifth and sixth respondents were bona fide purchasers could not by that fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were bona fide subsequent purchasers. But for the fifth and sixth respondents to have been bona fide subsequent purchasers, there must hasve been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth

respondents obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased. They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents. The fifth and sixth respondents who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title of the first to fourth respondents were set aside by the default judgment, the defeasible title of the fifth and sixth Respondents was also defeated.

[85] In the present case, as we have stated earlier the relevant Form 14A in respect of the transfer of the title to the appellant was a void instrument and therefore the appellant's title and interest in the lot was indisputably defeasible. The appellant was an immediate purchaser of the lot in question from its registered proprietor, MPM. That being the case the appellant clearly could not enjoy the benefit of the proviso to sub-s (3). Once the court is satisfied that the transfer of the title to the appellant arose from a void instrument, to borrow the words of Arifin Zakaria CJ (Malaya) in *Tan Ying Hong*, 'it automatically follows that they are liable to be set aside'.

CONCLUSION

[86] Accordingly, for reasons already given we would answer the question posed to us in the affirmative: 'that the title of registered proprietor who was a bona fide immediate purchaser without notice under the National Land Code (Act 56 of 1965) can be defeated by the non-registered valid equitable interest of an absolute assignee under an earlier sale and purchase agreement in respect of the same piece of land with another purchaser who was not the appellant.

[87] In the premise, we dismiss the present appeal with costs. We uphold and affirm the decisions and orders made by the High Court (which were upheld and affirmed by the Court of Appeal).

Appeal dismissed with costs.

Reported by Kanesh Sundrum